United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-7174

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANCES JOY CAPERS, et al.,

Plaintiffs-Appellants,

against

LONG ISLAND RAILROAD, et al.,

Defendants-Appellees.

On Appeal from the United States District
Court for the Southern District of New York

BRIEF OF APPELLANTS

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TABLE OF ABBREVIATIONS

75 Tr.	-	Refers to transcript of Harris' 1975 preliminary injunction hearing
Tr.	-	Refers to transcript of Harris' 1976 preliminary injunction hearing
P. Ex.	-	Refers to Exhibits introduced by plaintiff during Harris' 1976 preliminary injunction hearing
P. 75 Ex.	-	Refers to exhibits introduced by plaintiff during Harris' 1975 preliminary injunction hearing
D. Ex.	-	Refers to exhibits introduced by defendant during Harris' 1976 preliminary injunction hearing
D. 75 Ex.	-	Refers to exhibits introduced by defendant during Harris' 1975 preliminary injunction hearing
Op.	-	Refers to Judge Gagliardi's Opinion filed March 25, 1977

PRELIMINARY STATEMENT

This is an appeal from an order entered March 25, 1977 by the Honorable Lee P. Gagliardi, United States District Judge for the Southern District of New York, denying plaintiff Edward F. Harris' motion for a preliminary injunction. Judge Gagliardi's opinion is unreported.

ISSUES PRESENTED FOR REVIEW

1. Whether the lower court's failure to consider critically relevant evidence presented by plaintiff -- including defendant's prior treatment of Harris, Harris' prior record of service, defendant's general pattern and practice of discrimination, statistical evidence of discrimination, defendant's subjective criteria for disciplinary actions, its failure to follow its standard operating procedures in dealing with Harris and the shifting and inconsistent reasons given by defendant for Harris discharge -- which established that Harris' removal from service was a pretext for discrimination and retaliation -- constitutes reversible error.

2. Whether the lower court erred as a matter of law in holding that the evidence did not support a finding that the Railroad's concededly subjective system of discipline served as the vehicle for dispensing disparate disciplinary treatment to Edward Harris.

3. Whether the lower court's holding that defendant had met its burden of articulating legitimate, non-discriminatory reasons for removing Harris is based on errors of law and unsupported by the record.

STATEMENT OF THE CASE

This is an appeal pursuant to 28 U.S.C. §1292(a)(1) from an order of the Hon. Lee P. Gagliardi, U.S.D.J., denying a motion by plaintiff Edward E. Harris for preliminary relief requiring the defendant Long Island Railroad (the "Railroad") to reinstate Mr. Harris to his former position of Assistant Stationmaster ("ASM") on the grounds that his removal was the result of discrimination and retaliation for the exercise of his legitimate civil rights. Harris is a named plaintiff in the pending action (certified as a class action) which seeks relief on behalf of present and former employees from a broad pattern of alleged discriminatory practices engaged in by the Railroad in violation of Title VII of the Civil Rights Act of 1964.

Harris is a black American citizen, 55 years of age, married and the father of two children. He is a high school graduate who received a four-year scholarship to City College and completed two years while simultaneously working for the Railroad. Harris is also a graduate of the American Theatre Wing (75 Tr. 7) and is a veteran of World War II (Tr. 761).

The Railroad is a private stock corporation entirely owned and operated by the Metropolitan Transportation Authority. It has been a subsidiary of the MTA since January, 1966. Title II, Public Authorities Law, L.1965, c. 324, Section 1263 and 1266.

Since the present suit was instituted on July 25, 1972, Harris has been removed from his job as ASM, a management position, on three separate occasions -- first in August of 1974, again in September of 1975, and most recently on November 12, 1976. On each occasion the Railroad directed him to exercise his seniority as an usher, the union position he held prior to his promotion to management as an ASM in 1972. On each occasion Harris sought preliminary relief requiring the Railroad to reinstate him. In 1974 and 1975 the issues were resolved when, after court intervention, settlements were reached that resulted in his reinstatement. In 1976, an evidentiary hearing was held before Judge Gagliardi on December 10, 13, 14 and 15, 1976 and January 3 and 4, 1977. After reserving decision, Judge Gagliardi, on March 25, 1977 filed an opinion denying Harris' motion, finding specifically in light of the standards enunciated in McDonnell Douglas Corp. v. Green, 414 U.S. 792 (1972): (1) that Harris had established a prima facie case; (2) that the Railroad rebutted the prima facie case; and (3) that Harris did not produce sufficient evidence to carry his ultimate burden of proving discrimination.

In reaching its decision, the trial court, citing Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1003 (5th Cir. 1969), stated that it considered the six day hearing to be virtually the equivalent of a full trial on the merits and, therefore, determined the issue of likelihood of success on the merits (or whether questions existed that were a fair grounds for litigation) on the assumption that little additional evidence would be adduced at a later trial.*

STATEMENT OF FACTS

A. Harris' Efforts To Gain Promotion To Management**

Plaintiff Harris was first employed by the Railroad's predecessor, the Pennsylvania Railroad, in 1954 and, after a merger between the two, he became a Railroad employee in 1964 (75 Tr. 8 and P. 75 Ex. 2). He was initially hired as a mail

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* Precisely because the six-day hearing was considered tantamount to a full hearing on the merits, this Court in reviewing the denial of Harris' motion for a preliminary injunction should not be governed by the "abuse of discretion" standard. As the Court of Appeals in Pettway, supra, at 1003 noted:

> "Considering that the denial of a preliminary injunction was for nearly all practical purposes the ultimate determination of [plaintiff's] case on the merits ... we look upon it in that light, uninsulated by the usual principal that tests a grant or denial of preliminary injunctions in terms of abuse of discretion."

** The district court's opinion virtually ignores Harris' employment history prior to 1976 - history that we submit is highly relevant to the issues presented on this appeal.

handler and worked in that position from approximately 1954 to 1963 (Id.). In 1963 he became an usher, the top union job in the line leading to the job of Assistant Stationmaster, a management level, non-union job (75 Tr. 9-10).

An Assistant Stationmaster administers the operation of a station, and, as the lowest level management position, reports to the stationmaster, trainmaster, terminal superintendent and other management personnel who are also in charge of station operations (75 Tr. 10-11). Starting in August of 1967 Harris persistently sought promotion to the position of Assistant Stationmaster (75 Tr. 16 et seq.). At that time the ASM position was an "all white" job, as were virtually all management positions at the Railroad. Indeed, when Mr. Harris finally won an appointment as a permanent ASM in 1972 he was the first black to hold that position.*

It is uncontested that, during the five years he sought an ASM position, Harris was confronted with shifting and ever-increasing qualifying standards that had never been in effect for any white who had been promoted to the job. First, the Railroad told him in 1967 that in order to qualify as an ASM, he would have to "post for" or cover the job as ASM

* While Mr. Harris worked as an usher, 2 blacks were allowed to work as "extra" ASM's, i.e., an individual who is employed as an usher but is permitted to fill in when a permanent ASM is sick or on vacation (Tr. 588). Neither black was ever promoted to a permanent assignment (Tr. 584, 588).

on his days off in order to learn the trade (75 Tr. 17), although this had never been required of an applicant for the ASM slot before (75 Tr. 20). The Railroad then required Harris to take a three hour oral examination that had never been required of other applicants for ASM except A. E. Johnson, another black employee (who unsuccessfully attempted to move from an usher position into management) (75 Tr. 20-21). Harris was told he failed the examination because he was "a little weak" on the special operation section of the timetable, but that he should keep posting on his own time and take another exam in the future (75 Tr. 22).

Following a brief vacation, Harris returned to discover that Robert Partridge, a white, had been awarded an ASM position during his absence. Harris was advised that there was "no need for anyone else" but that the Railroad would still "keep me in mind" (75 Tr. 23). Partridge, in sharp contrast to Harris, had been allowed by the Railroad to post the Penn Station ASM slot on his regular work schedule, not on his days off. Moreover, Partridge was not required to take any qualifying examination before being awarded the job (75 Tr. 23). At that point Harris complained to the New York State Division of Human Rights, and the Railroad, at the suggestion of the Division, agreed to set up a posting program for Harris during his regular work hours as it had for Partridge (75 Tr. 24).

After posting for four days, Harris was still required to take another three-hour oral examination. In January of 1968, the Terminal Superintendent advised Harris that it was his "sincerest pleasure" to inform him that he had qualified as an ASM and "effective immediately" would be placed on the extra list as an extra ASM (P. 75 Ex. 3). In fact, Mr. Harris was not placed on the extra list and was not allowed to work as an ASM. Instead, he was told by management that he now had to post and take an examination at the Jamaica and Brooklyn stations before being allowed to work at Penn Station. These requirements had never been in effect before or after Harris sought the ASM job; and as noted, Partridge had not been required to post at all three stations before being allowed to work at one (75 Tr. 26-27, 35).

The Railroad delayed setting up a posting and examination schedule, but Harris was finally given another written and oral examination in May of 1968. This time, Harris was told that he failed the examination and would not be permitted to work as an ASM. Harris was also advised that Partridge had been required to take the same examination and had also failed. But Partridge, who had not been required to take an examination prior to being appointed as an ASM, simply returned to his ASM job, even though he had just failed the qualifying examination (75 Tr. 28-29).

Harris again went to the Division of Human Rights in the fall of 1968, and the Railroad was ordered to retest Harris

in a month (75 Tr. 29-30). Harris was told he passed this examination and, in November of 1968, was finally qualified as an extra ASM. Even when working as an extra ASM, however, Harris received less pay than the other ushers performing the same extra ASM functions (75 Tr. 31-32). After Harris complained to the Railroad, the Railroad "corrected" the situation by prospectively lowering the rate for all extra ASM's (Id.). And only after Harris returned to the Division of Human Rights once again in 1972 did the Railroad agree to pay him the difference between what he had earned and what the other ASM's had earned before the Railroad "rectified" this situation (75 Tr. 33).

The Railroad, having finally qualified Harris as an extra ASM, refused to promote him to the permanent management position of ASM until November 29, 1972 -- over five years after he first applied for the position (75 Tr. 13). By that time, three whites had been assigned as permanent ASM's ahead of him (75 Tr. 34-35). Even when a fourth vacancy occurred in January of 1971, the Railroad refused to promote Harris for over ten months. Instead, Harris was assigned to work every day for ten months as an "extra" covering the permanent ASM position that had been left vacant for all that time (75 Tr. 36-37). Unlike any other white employee who had become a permanent ASM, Harris actually performed the higher-paying ASM job on a permanent basis, yet earned only the pay of an usher working on the extra list (75 Tr. 37).

Between 1967 and 1972, Harris had watched while white employees, who were never required to meet the standards applied to him, successfully moved into the ASM slot (75 Tr. 23, 35). He ultimately filed complaints with the New York State Division of Human Rights, and although some relief was arranged between the parties, the complaints were ultimately dismissed by the Division. On the advice of his attorney, he then sought relief by bringing charges with the Equal Employment Opportunity Commission and by instituting the present action. On July 6, 1973, the Commission, giving substantial weight to proceedings before the Division of Human Rights, determined that there was reasonable cause to believe that the Railroad had, inter alia, violated Title VII by excluding Harris, and other blacks as a class, from management positions. (See Index to Record on Appeal -- Document No. 38: Harris Affidavit, sworn to November 16, 1976, and Exhibit A thereto.)

The foregoing evidence concerning Harris' efforts to gain promotion to management stands unrebutted by the Railroad. The district court, however, did not consider this evidence in concluding that "on the record here there is no evidence to support plaintiff's conclusory assertion [of retaliation]" (Op. at 14-15). Indeed, the court's only reference to this five-year chapter in Harris' employment history is found in a single, stark sentence: "In 1972 he was appointed an ASM, a management level, non-union job." (Op. at 3).

B. The Railroad Removes Harris From Service For The First Time (1974)

It was approximately 13 months after Harris obtained the EEOC finding of probable cause that the Railroad sought to remove Harris from his ASM position for the first time. The proffered reason was Harris' alleged failure of a written examination on the "Book of Rules" which examination the Railroad demanded he take on August 21, 1974.* A written Book of Rules examination had never before been administered to an ASM or any other management personnel.

Prior to this incident, the Railroad conducted classes on the Book of Rules attended by 15 or 20 other employees of the Railroad holding various jobs, such as trainman, block operator, conductor, and so forth. It was the practice of the Railroad to have its employees attend such a class every few years and Harris had attended two classes between November 1968 and August 1974 (75 Tr. 38-41). This class was conducted on an informal basis and the instructor used the questions and answers in an educational manner, often taking a proffered answer and expanding upon it or clarifying it. No test was ever given, no grades were received, and no one ever passed or failed (75 Tr. 39-41).

Harris was asked to attend such a Book of Rules class on August 1, 1974. He missed this class and was notified to

* The Book of Rules is a Railroad publication that sets forth the operating procedures and responsibilities of employees in the Transportation Department who are involved in the movement of trains.

attend another class on August 21, 1974. Harris soon discovered that some entirely new sort of "class" was being conducted. To begin with, Harris was the class' only member (75 Tr. 51). Furthermore, instead of the usual informal question and answer format, he was interrogated for about half an hour about a number of subjects not normally within the ambit of his day-to-day experiences as an ASM (75 Tr. 52-3, 57-8). Harris was then told he was required to take a written examination which covered a variety of topics such as signals, duties of a conductor, the equipment brakemen should carry, and similar matters (75 Tr. 53; P. 75 Ex. 9).

After Harris completed the examination, the Railroad examiner graded it in Harris' presence and advised him that he had not passed. Harris was then told that he should go see the Stationmaster for an assignment as an usher (75 Tr. 55-6). The explanation by the Railroad for this bizarre behavior was that Harris had manifested his "incompetence" in failing the examination and was therefore a "safety risk" to the Railroad's passengers.

On September 20, 1974, after Harris had obtained a temporary restraining order, an evidentiary hearing was commenced on his application for preliminary relief enjoining the Railroad from removing him from his position as an ASM. During the course of Harris' direct examination, the court

intervened and the matter was resolved by the parties agreeing that Harris would remain as an ASM if he passed a written Book of Rules examination given to a randomly selected group of ASMs. Harris subsequently received the highest score of the seven Assistant Stationmasters taking the test. Four of the seven ASMs taking the test failed and were removed from service (marking the second time that an ASM or any management employee had been required to take a written Book of Rules exam or been removed for failing one).

The disparate treatment accorded Harris in 1974 is largely unrebutted. The Railroad offered no contradictory evidence on this issue other than a brief affidavit by Nelson Peters, the Railroad examiner, who stated that he was "shocked" at Harris' answers and that it was "standard procedure" to give a written examination. (Since the Railroad never called Peters as a witness, there is no record of his reaction to the answers of the other ASMs on the specially ordered examination.) It is in any event undisputed that no management employee had ever been required to take a written Book of Rules examination before, much less been removed from service for allegedly failing one (75 Tr. 56). Indeed, when Harris told his fellow employees why he had been demoted, "they felt it was the strangest thing anybody ever heard of" (75 Tr. 56-57).

Further evidence of disparate treatment was adduced from the Railroad's own witnesses who testified that <u>after</u>

Harris was demoted in August, 1974 the company instituted a procedure: (1) requiring all management personnel to take a written examination on the Book of Rules and (2) requiring a second written examination on the physical characteristics of the Railroad of all management personnel at the assistant trainmaster level or above (75 Tr. 378-379).*

At a subsequent hearing, Assistant Superintendent Dixon testified that every manager at the assistant trainmaster level or above has to be able to take over the running of a train and, therefore, has to be qualified on the Book of Rules and physical characteristics (Tr. 674). Consequently, if anyone failed either exam, he would, according to Dixon, be removed from service (just like Harris) until he passed the exam (Id.). The difference between the Railroad's theory and its practice became evident, however, when Assistant Trainmaster Robert Landsperg and Assistant Terminal Superintendent Louis J. Rizzacasa (both of whom are white and have been called by the Railroad to testify against Harris) failed the physical characteristics exam administered shortly after Harris had been removed from service in 1975 (75 Tr. 322, 379). Applying a standard quite different from the one applied to Harris (but reminiscent of the standard applied to Partridge in 1968)

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* Lou Rizzacasa, the terminal trainmaster, testified that it was the "first time" he had ever taken a written Book of Rules examination and that the physical characteristics examination was "something new" (75 Tr. 378-379).

neither Rizzacasa nor Landsperg were removed from service as a so-called "safety risk" and both remained in their management positions between that time and the time that they eventually passed the examination (Id.).

The district court in determining that there was "no evidence" to support plaintiff's "conclusory assertion" of discrimination did not address itself to the events of 1974 other than to note that "the LIRR agreed to restore Harris to the position of ASM" (Op. at 4).

C. The Railroad Removes Harris From Service For The Second Time (1975)

In September of 1975 the Railroad removed Harris from service as an ASM for the second time, on the grounds that he failed to have an usher announce a track change for a single departing train on September 12, 1975 (75 Tr. 354).

The train involved, Train 708 to Hempstead, normally departed on Track 16 at 6:51 A.M. (75 Tr. 71, 101). Pursuant to orders from Terminal Superintendent Gaynor, Robert Landsperg, the Assistant Trainmaster on duty with Harris that night, changed the departure of Train 708 from Track 16 to Track 15 (75 Tr. 312). In essence, this meant that the passengers for the 708 would board the train from the same platform, but on the track on the opposite side of the platform from which Train 708 normally departed.

After the decision was made, Harris directed the usher, Shearer, to put up the proper signs and to announce the track change on the PA system (75 Tr. 76-8, 101-103). Shortly thereafter, Rizzacasa, the Terminal Trainmaster who works the shift that relieves Harris, burst into the office and began yelling at Harris about passengers waiting on the wrong side of the platform for Train 708 which, because of the change of equipment, was sitting on the opposite side of the platform. Rizzacasa, still yelling, demanded to know "when are you going to decide to make an announcement" and demanded that Harris tell the usher to announce the track change (75 Tr. 81, 317, 353, 365). Harris, who had already told the usher to make the announcement, asked Rizzacasa to stop yelling at him, and pointed out that Landsperg, Harris' boss, was also on duty at the time and was in charge of the operation (75 Tr. 81, 297, 318). Rizzacasa's reply was that Harris was not to tell him who was in charge of the station, whereupon he took Harris out of service. Harris, who never raised his voice to Rizzacasa during this incident, packed his belongings, boarded the train -- the very train over which the controversy leading to his termination had centered -- and sat back as it departed right on time (75 Tr. 84-5, 107).

Minutes after he fired Harris, Rizzacasa called King at Jamaica Station and told him that Harris had been removed for "failing to do his duties" in not having the announcement made.

No mention was made of any supposed "insubordination" (75 Tr. 368-69; P. 75 Ex. 12).

In fact, Shearer, not Harris, had made a mistake in confusing Train 708 with another train departing at 7:01 A.M. and consequently put up the wrong signs (75 Tr. 103). Indeed, immediately after Shearer realized that Harris had been fired, he told Rizzacasa that he, not Harris had made the mistake. As Shearer testified,

> "I went to Mr. Rizzacasa and said to him, 'It was my fault. I put the wrong signs up causing this man to get blamed for it.' I said, 'Don't blame him, it was me that done it.' He said to me, 'All right.'" (75 Tr. 106)

Shortly thereafter, Rizzacasa called Dixon and, perhaps searching for a more defensible reason, said he fired Harris because Harris told Rizzacasa not to yell at him whereupon Rizzacasa responded "if you do not want to be yelled at, you go home, you're out of service" (P. 75 Ex. 12). Later that morning Rizzacasa wrote a report to Gaynor, the Terminal Superintendent (75 Tr. 410). Gaynor then sent a written statement to Harris stating that he was removed for "insubordination" (75 Tr. 407-408).

Although he was fired for alleged "insubordination", Harris never refused to comply with any order from Rizzacasa to have the usher make the announcement (75 Tr. 81). And the undisputed fact remains that Harris had already told the usher

to make the proper announcement at about 6:30 A.M. (75 Tr. 77, 102).

Shearer was so upset at what had occurred that, despite his earlier conversation with Rizzacasa, he spoke to him a second time that morning and repeated that the error had been his responsibility:

> "Don't blame Mr. Harris because it was a mistake I made and I don't know why I have made it, I have never made these mistakes before. I made this mistake and I am sorry for it." (75 Tr. 107)

Shearer went home that day believing that Harris would be reinstated (75 Tr. 107).

Shearer's frank admission was simply ignored by management. In their reports to Gaynor of the events of September 12, neither Rizzacasa nor Landsperg even mentioned that Shearer had admitted that the error had been his fault. At the 1975 hearing, both stated that they thought this fact was "unimportant" (75 Tr. 370, 320).*

Gaynor's letter dismissing Harris for insubordination was written without any effort to ascertain the facts in order to decide who, if anybody, was in the wrong. Gaynor spoke only to Rizzacasa and admitted that he never even spoke to Harris, much less Landsperg or Shearer, in order to determine whether

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* Neither Shearer, who admitted it was his error, nor Landsperg, who was the assistant trainmaster in charge of the station, were ever removed from service or even reprimanded for the events of September 12 (75 Tr. 371, 396).

Rizzacasa's version of the events of September 12 was accurate (75 Tr. 409).* Yet during the hearing held in 1976, as a result of the Railroad's decision to remove Harris for a third time, Gaynor and Dixon both claimed that they had to have all the facts, including reports from all parties involved, before deciding who was at fault (Tr. 482, 515, 643). Moreover, Dixon testified that it is standard procedure to give managerial employees an opportunity to present their side of a story at a meeting before a final decision is made to remove them from service (P. Ex. 15 - Dixon 1976 Dep., pp. 122, 134; Tr. 672). Yet, Gaynor removed Harris from service in 1975 without even affording Harris the same opportunity to be heard that white employees have customarily been given (75 Tr. 409).

D. The 1975 Hearing And Evidence Of Harris' Performance As An ASM

While the Railroad advised Harris on September 12, 1975 that he was being removed from service for "insubordination", it shifted ground and, for the first time at trial, alleged that Harris was also removed as a result of his "attitude" and "poor performance". Over plaintiff's objection, the Railroad was permitted to introduce evidence of Harris' purported poor performance as an ASM (75 Tr. 408, 393-394, 140). It is this evidence

* Landsperg eventually wrote a report of the 1975 incident but it was five days after Gaynor removed Harris.

that the court below referred to in its opinion as "reprimands and notices of his poor performance in 1974 and 1975", some of which, the court held, had not been "effectively rebutted by the plaintiff" (Op. at 12, 4).

The evidence offered by the Railroad at the 1975 hearing consisted mainly of memoranda sent to Harris by Gaynor, the Terminal Superintendent, complaining of certain alleged failures to make log book entries, deal with mechanical delays, and so forth. Gaynor's testimony revealed that he had no first-hand knowledge of many of the events, that the reports were often based on information supplied by others, and in any event the reports were routinely circulated to management and made part of Harris' personnel file without ever asking Harris for an explanation (75 Tr. 400-07). None of the employees with actual knowledge of the events were called by the Railroad. Harris, however, testified as to each of these events and rebutted most of such hearsay (See 75 Tr. 166-208). Moreover, one of the Railroad's witnesses, Landsperg (who directly supervised Harris night in and night out for a year), testified that Harris followed through on the performance of his duties, and that Landsperg had never had any problem with Harris or any reason to reprimand him (75 Tr. 305-306). Railroad witnesses also testified that an ASM's salary is determined by performance, that pay increases are based on merit, and that Harris was one of the highest paid ASMs on the Railroad (75 Tr. 282).

Following the completion of the 1975 evidentiary hearing the dispute was resolved when, at the court's intervention,

the parties stipulated on October 7, 1975 that Harris would be returned to his ASM position after a 60-day suspension to run from September 12, 1975, the date Harris was originally removed from service.* The stipulation specified that it was without prejudice to the rights of either party, that Harris' claims for back pay and damages were specifically preserved, and that both parties reserved their arguments regarding the incident. The net result was that Harris was reinstated as an ASM on November 11, 1975 -- 38 days after the trial court concluded its hearing.**

E. The Railroad Removes Harris From Service For The Last Time (1976)

On November 11, 1976 Harris was demoted for the third time since he joined the class action as a named plaintiff.

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* The settlement was agreed to after the court had informed the parties that its decision would probably not be filed for at least 30 additional days (75 Tr. 421-22).

** At the end of the period agreed to by the parties, the Railroad informed Mr. Harris that he would have to undertake a physical examination before being reinstated to service on the purported theory that his extended absence raised questions about his physical well-being and hence his ability to perform his duties as an ASM. Plaintiffs objected on the ground that such a requirement had not been made part of the settlement of the court and that the Railroad had failed to show that this was a bona fide requirement imposed on other management employees of the Railroad in similar circumstances. Indeed, the court expressed concern that the Railroad had never mentioned such a requirement before and warned that if the Railroad was trying to take advantage of the situation "we are going to end up with another personal discrimination suit". (See transcript of the hearing held November 11, 1975, at p.2). After a hearing, the court ordered Mr. Harris to undergo the physical examination, which he passed.

This occurred after a delay of four trains between 12:42 A.M. and 1:16 A.M. on November 10, 1976. The trains delayed in arriving or departing from Penn Station were: Train 82 (11 minutes), Train 1691 (11 minutes), Train 195 (9 minutes) and Train 1602 (5 minutes).

1. Responsibility For The Delays

As the court noted, the delays on November 10 were related to the closing of line 3, one of the two East River tunnels used by the Railroad. The closing of line 3 requires the rerouting of trains through line 1. It is part of A Tower's job to advise the ASM of the exact time of the line closing, so that the ASM can advise arriving trains to pull to the proper position on the platform to enable them to depart through line 1 instead of line 3 (Tr. 686).

It is undisputed that A Tower never contacted Harris to tell him when line 3 was to close and that two calls by Harris were unanswered.* Unable to get the necessary information from A Tower, Harris spoke to the yardmaster on four separate occasions about the closing of line 3. Harris testified that the yardmaster reported that he did not know the exact time

* This was not the first time that A Tower had refused to cooperate with Harris, who had brought this communication problem to Gaynor's attention as early as February or March, 1976. Gaynor claimed that he complained on several occasions to Amtrak and requested that information on line closings be passed directly from A Tower to the ASM (Tr. 506). A Tower, however, claimed he never received any such complaint (Tr. 268).

line 3 was closing but would let Harris know as soon as he heard from A Tower (Tr. 38-40). This testimony was disputed by the yardmaster who claimed that he gave Harris the necessary information (Tr. 192, 199-200). The trial court specifically declined to resolve this factual dispute as to whether Harris had or had not been properly informed of the time of the line closing (Op. at 6).

In any event, it is clear that Train 82 was not in the proper position to travel through line 1, that this was not discovered by anyone until departure time at 12:41, and as a result the train was delayed 11 minutes.* Trains 1691 and 195 were delayed on arrival because they were directed by the yardmaster to wait outside the station until after Train 82 departed from the station 11 minutes behind schedule. The yardmaster admitted that this was a bad decision on his part and that the resulting delays had "nothing to do with Mr. Harris" (Tr. 181-84). The last delay (Train 1602 -- 5 minutes) was the result of a number of events, some of which had nothing to do with Harris. While Gaynor claimed that Harris was responsible

* The yardmaster -- though claiming he had given Harris the necessary information -- admitted that it was part of his job to check to see that a train is in the proper position to depart line 1, but that he did not do so that night. The yardmaster also testified (as did Harris) that he asked C Tower to check to see if Train 82 was properly positioned but that C Tower did not do so (Tr. 199-200).

for this, as well as the other delays since he was in charge of the station (Tr. 496), his testimony was squarely controverted by the yardmaster who was there at the time and who testified that the delay was not Harris' fault (Tr. 188, 189).

The court below did not discuss the details of the four delays -- none of which exceeded 11 minutes -- and declined to make any findings as to who was specifically at fault for any of them. It held simply that, while others might be responsible, Harris had "final responsibility" for the delays, was "negligent in his duties" and that this was one of the factors justifying the Railroad's removal of Harris (Op. at 7, 12).

The Railroad, however, did not even claim at trial that responsibility for the delays or negligence in performing his duties that night was a factor in removing Harris. After extensive evidence was introduced as to the reasons for the delays, the Railroad simply abandoned that claim and testified that Harris had actually been fired for "insubordination," "attitude" and "poor performance" unrelated to the four delays (Tr. 493, 660-661).

2. The Railroad's Investigation Of The Delays; The First Harris Report And The Request For A Second Report

Before completing his tour of duty at 7:00 A.M. on November 10, Harris wrote a report in the stationmaster's log

book explaining the delays that had occurred during the night. Harris was the first employee to write a report on the events of November 9-10. His report was as long and as detailed as any of the subsequent reports written by other Railroad employees (P. Ex. 3, 5 and 6; Tr. 648).

Later in the morning of November 10, Dixon requested Gaynor to investigate the reason for the delays. Dixon claimed he specifically requested reports from Harris, the yardmaster, the A Tower operator and the C Tower operator; at that point, Harris was the only one of the group to have written a report (Tr. 515).

Dixon and Gaynor contended that they wanted a second report from Harris because the first report was incomplete; what the Railroad was looking for was a report similar to the one subsequently written by the yardmaster (Tr. 530, 647). Dixon further stated that he would have been satisfied had Harris originally written a report as thorough as the ones he reviewed that had been prepared by the yardmaster and C Tower (Tr. 647-48). However, Dixon admitted on cross-examination that Harris' first report was indeed as long and as complete as the one prepared by the yardmaster (Tr. 648). And while Dixon said he wanted Harris' report to be as long as C Tower's (Tr. 647), C Tower testified that he

never even wrote a report until after this litigation commenced (Tr. 400).*

Harris was in any event requested by one of Gaynor's assistants to write a second report when he returned to work at 11:00 P.M. on the evening of November 10. Harris began to write a second report during the course of his shift but did not complete it, partially as a result of problems that developed in the station that night. He returned home at the end of this shift on November 11, called the Terminal Trainmaster (Rizzacasa), and advised him that he had not completed the report that night but would bring it with him when he arrived for duty that evening. Rizzacasa told Harris that this would be "fine" (Tr. 73, 129, 579, 589).**

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* Gaynor, in contrast to Dixon, insisted that the report was incomplete in that it did not discuss the delay to the two arriving trains (1691 and 195) but only referred to the delays in departure (Tr. 530). Gaynor admitted, however, that the yardmaster's report (which the Railroad found satisfactory) likewise did not refer to the two arriving trains. And the yardmaster testified that they were not discussed in his report as the Railroad told him it was "not interested" in the delays to the two arriving trains (for which the yardmaster later accepted responsibility) (Tr. 181-184).

** Later that day, Gaynor's assistant wrote a memorandum (to Gaynor) charging Harris with "insubordination" for not writing a second report during the night shift (D. Ex. J.). The memorandum simply omitted the fact that Harris had called Rizzacasa or that Rizzacasa said "fine" -- bring it in that evening (Id.). At trial, the Railroad did not claim that not completing the second report during the night shift was "insubordination". Indeed Dixon said he took no exception to Harris' call and Rizzacasa's response (Tr. 657-8).

Harris woke up about 4 o'clock that afternoon, intending to write a second report before returning to work. However, an inlay fell out of his mouth requiring immediate dental attention. As a result of three hours spent at, or travelling to, the dentist's office, he did not complete a second report by the time he arrived for work at 11 o'clock that evening (Tr. 74-75).

Harris did not claim that it would have been impossible for him to have written a second report during the day of November 11 -- only that the time alloted for this task before returning to work had been used up by the dental appointment (Tr. 75). This did not create in Harris any sense of urgency for the simple reason that he is the only management employee on duty during the graveyard shift at Penn Station. As far as Harris knew, there would be absolutely no one to give a report to until the following morning. Indeed, Gaynor, the individual who wanted the report, would not be getting on the job until 10:00 the next morning. Thus Harris testified, and the Railroad did not contest, that he believed he had ample time to write another report during the early morning hours of November 12 (Tr. 75, 499).

3. Harris' Removal From Service On November 12

Unknown to Harris, Gaynor, who works the day shift from 10:00 A.M. to 7:00 P.M., did not go home on the evening of November 12 as is his normal practice (Tr. 499, 531-32).

Instead Gaynor went out to dinner at the end of his shift and returned later in the evening to await Harris' arrival at 11:00 P.M. (Tr. 532). No one had called Harris during the day to inform him that Gaynor would be waiting that evening (Tr. 666).

Upon Harris' arrival, Gaynor asked for the report. It is undisputed that Harris explained that he had a dental problem, that he in any event had no reason to believe that anyone would be requesting the report that evening, and that he offered to write the report for Gaynor that evening.* Gaynor neverthe-

removed Harris from service and ordered him to report in the morning for a job as an usher. Gaynor then woke Dixon up with a midnight telephone call and told Dixon that he had just removed Harris "for insubordination for not filing a report". Dixon approved the action over the phone (Tr. 536-38, 660).

In explaining what led him to remove Harris on November 11, Gaynor claimed that he was under great pressure from Dixon to submit a detailed report on the train delays of November 9-10 and that he needed Harris' second report in order to do so. This was directly contradicted by Dixon who said he never

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* The witnesses, while in agreement on the substantive points, diverged on the atmosphere of the discussion. Harris claimed that "I told him I was sorry but I didn't [have the report] and then I proceeded to explain to him the ... dental crisis" (Tr. 78). Gaynor's view of the meeting was different: "I had asked Mr. Harris when he come in, did he have the report, and he said no. I says, I asked him how come. And he says that he rather go to the dentist in the afternoon, and he has some more important things to do during the day." (Tr. 490).

asked Gaynor to prepare a report and only wanted reports from the individuals directly involved (Tr. 549-51, 643, 644).

Gaynor also claimed that as of the morning of November 11, the only thing lacking to complete his investigation and the report he said Dixon wanted, was the second report from Harris. Failing to get this final piece to the puzzle, Gaynor decided he could not take any more and removed Harris from service (Tr. 525-526, D. Ex. K). Likewise, Dixon testified that he specifically asked Gaynor that same morning if he had all the reports Dixon requested (i.e., A Tower, C Tower, the yardmaster and the stationmaster), and Gaynor replied that he had all the reports except for the one from Mr. Harris (Tr. 645).

Gaynor's and Dixon's testimony as to the urgency of the investigation is unsupported by the documentary evidence and is directly contradicted by the testimony of other Railroad witnesses. It is undisputed that, if one ignores Harris' logbook report, only one of the four reports was completed (the yardmaster's) when Gaynor told Dixon he had "all" the reports. Dixon never saw a report from A Tower or C Tower: C Tower never prepared a report until long after Harris had been removed and did so only at the request of Railroad's counsel in preparation for the hearing below; A Tower never wrote a report at all, and was not even contacted about the delays until six days after they occurred (Tr. 267, 400).

Harris' alleged insubordination was not that he ever refused to write a second report , but that he delayed in writing it. Dixon testified that he believed that Harris had delayed 48 hours in preparing a report. Dixon stated that while a delay of 24 hours would not amount to insubordination, a 48-hour delay was too long (Tr. 663). In fact, the length of Harris' delay was exactly 24 hours -- from 11:00 P.M. on November 10 when he was asked to write a second report, to 11:00 P.M. on November 11 when he was removed from service (Tr. 65, 445, 532).

F. The Railroad's Disciplinary System And Evidence Of Disparate Treatment

It is undisputed that the Railroad's disciplinary treatment of management employees is wholly subjective: there are absolutely no objective standards by which such discipline is gauged, and it is up to each individual supervisor to decide who is to be disciplined and what that discipline will be (Tr. 680-681).

It is further undisputed on the record below that Harris is the only ASM ever removed from his job for any reason. More importantly, the only management employees who have ever been demoted for insubordination were a group of individuals who, in December of 1972, refused to obey direct orders to cross a picket line and move trains containing perishable goods during a protracted and bitter strike -- a quantitatively and

qualitatively different situation from the instant factual setting (Tr. 677-678). Moreover, another management employee (Landsperg) was requested by Gaynor in 1975 to prepare a written report and did not do so until four or five days after Gaynor made the request. The Railroad never claimed that this tardiness was "insubordination" nor was Landsperg disciplined in any way for the delay (75 Tr. 396).

The Railroad sought to introduce evidence of other white employees who had been removed from management for poor performance (D. Ex. L). Ten personnel files were introduced in support of this, but the record is very sketchy (P. Ex. 13). Dixon admitted on cross-examination that he had personal knowledge of only a few of the instances, and that he did not know why five of those employees were fired (Tr. 671-72, 680). As to all of the individuals, Dixon admitted that the reasons for disciplining such individuals was not necessarily spelled out in their personnel files and, indeed, that some files indicated no more than the fact that the employee had been demoted (Tr. 624-625).

More importantly, the record contains numerous examples of other white individuals being subjected to lesser disciplinary punishments for more severe infractions. Thus, a white engineer named Wership refused to obey a direct order from Harris as well as from the Railroad's senior management to pull

his train out of the station to avoid a delay. Mr. Wership's punishment for insubordination: a one-day suspension* (75 Tr. 204-205).

Other examples include: (1) Louis Satter: directly responsible for the derailment of a train in 1972 resulting in serious personal injuries to the trains's passengers and substantial damage to the Railroad's equipment; numerous trains were delayed and the entire Brooklyn Station shut down. Discipline: transferred from Assistant Director of the Movement Bureau to Chief Train Dispatcher; no reduction in pay but ordered not eligible for pay increases (in fact Satter received pay increases throughout 1973) (Tr. 673; P. Ex. 13.)

(2) Robert Landsperg: an Assistant Train Master, charged with "poor performance", including laying off sick, not covering his assignment, calling off short of time and looking for excuses for not doing his job. Discipline: no removal from managerial service, but transfer from New York to Jamaica Station (Tr. 669-70). (According to Dixon, this was done in hope that, in light of Landsperg's 12 years of service on the Railroad -- contrast the treatment of Harris after 23 years of

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* The fact that Wership was a non-management employee does not render his insignificant discipline less discriminatory when compared to Harris. As Dixon testified, the fact that an individual is a union employee does not lend to a different discipline, rather, "the punishment fits the crime" (Tr. 682).

service -- Landsperg would be able to do a better job in Jamaica. (Id.)).*

(3) Yardmaster Chauncey: long history of errors of judgment leading to the substantial delay of a number of trains; finally on December 8, 1975, misrouting of one train on top of another, causing a delay of 38 trains. Discipline: Chauncey (like Landsperg) transferred out of New York -- he continued to work as a Yardmaster in the freight yards at the same rate of pay (Tr. 554, 559, 562, 564, 565).

Finally, while the Railroad ultimately did not claim that Harris was removed as a result of any alleged responsibility for the four train delays, the record, in any event, indicates that such delays are routine and that, in more serious instances, the Railroad has meted out far less severe discipline to white employees responsible for train delays. Excerpts from certain of the Railroad's disciplinary files (P. Ex. 13) show the following discipline for incidents involving train delays:

Individual	Date	Infraction/Delay	Discipline
J. B. Howe	8/21/73	10 min; 9 min.	reprimand
	9/13/74	9 trains; 5 to 24 min.	3 day suspension
	12/17/75	misroute; delay	2 day suspension

* Landsperg was eventually removed from service when his performance did not improve in his new location.

Individual	Date	Infraction/Delay	Discipline
J. B. Howe	9/09/76	misroute; 28 min. delay	5 day suspension
John Dolmat	3/07/72	delay of 11 trains	2 day suspension
Alan Lines	4/29/74	failure to comply with 3rd Rail Plan	10 day suspension
	6/15/73	misroute	15 day suspension (4 served)

In short, the record is full of instances of white employees receiving far less punishment for greater infractions than those charged against Harris.

ARGUMENT

I.

The Court's Failure To Consider All The Evidence Of Pretext Introduced By Plaintiff Effectively Denied Harris A Full And Fair Hearing And Constitutes A Serious Error of Law Requiring Reversal

In McDonnell Douglas Corp v. Green, 414 U.S. 792 (1972), the Supreme Court delineated the order and allocation of proof in an employment discrimination case. The Court stated that "the complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination". Id. at 802. (Here, Judge Gagliardi found that such burden had been sustained. (Op. at 11)) In McDonnell Douglas, the Court stated that once the prima facie case had been established, "the burden then must shift to the

employer to articulate some legitimate, nondiscriminatory reason for the employee's [discharge]". Ibid. (We analyze Judge Gagliardi's conclusion that the Railroad sustained its burden in this respect in III, infra.)

But, as the Supreme Court held, "the inquiry must not end here". Rather, the complainant "must ... be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext". Especially relevant, the Court held, would be evidence of disparate treatment between blacks and whites, facts as to the defendant-employer's treatment of the plaintiff during his term of employment, defendant's general policy with respect to minority employment and, in regard to the latter point, statistics as to an employer's policy and practice which may be helpful in determining whether the employer's discharge of plaintiff conformed to a general pattern of discrimination against blacks. Id. at 804-05.

In reaching its decision, however, the trial court did not even consider the following points raised by plaintiffs that are well established indices of pretextuality: defendant's prior treatment of Harris; Harris' prior record of service; defendant's general policy with respect to minority employment; statistical evidence of discrimination; defendant's subjective criteria for disciplinary action; its failure to follow standard operating procedures in dealing with Harris; and the shifting

and inconsistent reasons given by defendant for Harris' discharge at different stages of the proceeding. Indeed, the only evidence of pretext considered by the court was on the issue of disparate disciplinary treatment. Thus, the court appears to have improperly believed that pretext can only be established in a discharge case by proof of disparate discipline.*

Judge Gagliardi has thus failed to follow the mandate of the Supreme Court to consider highly probative evidence of pretextual discrimination. In so doing, the district court has committed reversible error.

A. The Railroad's Prior Treatment Of Edward Harris

As specifically noted in McDonnell Douglas Corp. v. Green, supra, evidence of an employer's prior treatment of a Title VII plaintiff is relevant to and probative of the pretextual nature of the challenged action taken by the employer

* The district court may have also been under the mistaken belief that, in order to meet the burden of showing pretext, an employee must show that his employer's reasons for terminating him are wholly without justification. While plaintiffs urge that the totality of the evidence requires such a conclusion in the present case, it is important to note that in showing pretext, it is not necessary for plaintiff to prove that race was the only reason for an employer's action, only that it was one of possibly many reasons. Thus, even if the Railroad in the instant case had some legitimate, non-discriminatory grounds to remove Harris (which we strenuously contest), plaintiffs would meet their burden by showing that Harris' race was at least one of the factors in the Railroad's decision to remove him. See King v. Laborers International Union, 443 F.2d 273, 279 (6th Cir. 1971); Riley v. Adirondack Southern School for Girls, 541 F.2d 1124 (5th Cir. 1976).

(i.e., the discharge of plaintiff). What may appear on its face to be a justifiable reason for an employer's action may very well become a glaring example of discrimination and retaliation when viewed in light of all the surrounding circumstances and especially in light of prior similar acts of the employer directed against plaintiff. See Marquez v. Omaha District Sales Office, Ford Division, 440 F.2d 1157 (8th Cir. 1971); Walton v. Xerox Corp., 13 E.P.D. ¶11,436 (D. Colo. 1976); D. H. Baldwin Company, 207 N.L.R.B. 25, enforced, 90 L.R.R.M. 2891 (8th Cir. 1974); Westinghouse Learning Corp., 211 N.L.R.B. 14, 40-43 (1974).

In Lowry v. Whitaker Cable Corporation, 348 F. Supp. 202 (W.D. Mo. 1972), aff'd, 472 F.2d 1210 (8th Cir. 1973), the court looked at the totality of the circumstances surrounding plaintiff's employment with defendant prior to discharge. In this regard, the court considered the constant criticism of plaintiff, warnings and reprimands by her white supervisors, defendant's failure to assign plaintiff a locker or to instruct her where to eat, and defendant's premature assumption that plaintiff was quitting. The court concluded that prior repeated instances of similar acts by defendant were probative of defendant's intent to discriminate against plaintiff and that, based on the foregoing, plaintiff had been discharged as a result of racial discrimination. See National Labor Relations Board v.

National Seal Corp., 127 F.2d 776, 778 (2d Cir. 1942); Marquez v. Omaha District Sales Office, Ford Division, supra; Walton v. Xerox Corp., supra.

The instant case presents a compelling pattern of prior acts of a discriminatory and retaliatory nature against Edward Harris by the Railroad, including uncontroverted evidence as to the shifting and ever-increasing qualifying standards which had never been in effect for any white employee but which were applied to Harris when he sought the ASM position; refusal to promote Harris to the permanent management position of ASM until over five years after he first applied; assigning him to work every day for ten months as a lower paying "extra" ASM before giving him the higher paying permanent job; administration of a written "Book of Rules" exam never before administered to an ASM or any other management personnel; removal from service for "failing" this examination in contrast to the treatment of two other management employees (Rizzacasa and Landsperg); and demotion of Harris in 1975 for "insubordination" for his alleged failure to have an usher make a single train announcement, although the usher in question testified that Harris had indeed told him to make the track change and that he (the usher) had made a mistake and put up the wrong sign.

The foregoing largely unrebutted evidence of prior acts of discrimination and retaliation by the Railroad against

Harris was ignored by Judge Gagliardi and no findings were made in that connection. Such failures by the district court must be deemed reversible error.

B. The Railroad's General Pattern And Practice Of Discrimination Against Blacks In Management

Evidence that defendant follows a general policy of discrimination in the hiring and promotion to management of blacks is a factor the relevance of which cannot be ignored in evaluating whether a particular black management employee has been discharged as a cover-up for discrimination. See McDonnell Douglas Corp. v. Green, supra; Rich v. Martin Marietta Corporation, 522 F.2d 333 (10th Cir. 1975); Kohn v. Royall, Koegel & Wells, 496 F.2d 1094 (2d Cir. 1974); Burns v. Thiokol Chemical Corporation, 483 F.2d 300, 305 (5th Cir. 1973); Marquez v. Omaha District Sales Office, Ford Division, supra; Burney v. North American Rockwell Corp., 302 F. Supp. 86 (C.D. Cal. 1969). Failure to consider evidence of an employer's discriminatory patterns and practices in ruling upon an individual's claim of discrimination has been found to be reversible error. Donaldson v. The Pillsbury Company, No. 76-1288 (8th Cir. April 14, 1977), rev'g 11 E.P.D. ¶10,653 (D. Minn. 1976).

A pattern and practice of discrimination is often vividly protrayed by statistical evidence. As the Fifth Circuit stated in Burns v. Thiokol Chemical Corporation, supra:

> "In the problem of racial discrimination, statistics often tell much, and Courts listen.... Our wide experience with cases involving racial discrimination in education, employment, and other segments of society have led us to rely heavily in Title VII cases on the empirical data which show an employer's overall pattern of conduct in determining whether he has discriminated against particular individuals or a class as a whole...." 483 F.2d at 305. (citations omitted)

The court in Brown v. Rollins, Inc., 397 F. Supp. 571 (W.D.N.C. 1974), an individual discrimination action, relying in part on statistical evidence as to the number of whites (none) and blacks in the lower status job of sample room girl, compared to the number of whites and blacks (none) in the higher status job of sales person, rejected defendant-employer's explanation that plaintiff (a sample room girl) had been discharged for her poor performance and absenteeism and held that she had been refused promotion and discharged in whole or in part because of discrimination and retaliation.

Similarly, the Eighth Circuit in Marquez v. Omaha District Sales Office, Ford Division, supra at 1160-62, relied on statistical evidence demonstrating a marked absence of minority employees in defendant's employ, compared to percentages in the district and region, in finding substantial proof of racial discrimination in defendant's failure to promote the individual plaintiff. See also EEOC v. Liberty Mutual Insurance Co., 346 F. Supp. 675, 676 (N.D. Ga. 1972), aff'd per curiam, 475 F.2d 579 (5th Cir.), cert. denied 414 U.S. 854 (1973).

Plaintiff Harris introduced statistical evidence which overwhelmingly establishes a pattern of discrimination against

blacks in management positions. From 1966 to 1973, the percentages of blacks in management were as follows: 1966 (.63%), 1967 (.55%), 1968 (.45%), 1969 (1.28%), 1970 (2.10%), 1971 (1.45%), 1972 (1.12%) and 1973 (2.05%) (P. Ex. 11.)* When compared to the percentage of blacks in the working force in the New York Metropolitan Statistical Area (14.75%) (source: 1970 Census), the pattern of discrimination is vividly portrayed. Moreover, statistical evidence strongly suggests that a pattern of discrimination pervades the Railroad's entire work force. Based on EEOC reports filed with the United States government (P. 75 Ex. 11), the number of black Railroad employees employed as unskilled laborers or service workers compared to the total number of black Railroad employees were: 52.76% (1966), 62.41% (1967), 59.59% (1968), 29.42% (1969), 30.22% (1970), 44.00% (1971), 44.00% (1972) and 38.37% (1973). In sharp contrast to

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* During the course of the most recent hearing concerning Harris, the Railroad called Edward Zeman to testify that the Railroad had discovered that the EEOC reports which it has filed with the United States Government since 1965 may contain discrepancies with respect to reported numbers of blacks in management (Tr. 739, et seq.). No substitute records, but only Zeman's oral testimony, were offered on this point. Such vague testimony, as opposed to reconstructed records backed by rational explanations, hardly suffices as the best evidence available on the subject and, therefore, is entitled to minimal probative value. Federal Rule of Evidence 1002; 4 Wigmore, Evidence §§1177-1282. Even if the six "newly discovered" black management employees were assumed to have been employed all at the same time and continually since 1966, the percentage of blacks in management would change only as follows: 1966 (4.40%), 1967 (3.87%), 1968 (3.15%), 1969 (3.21%), 1970 (3.89%), 1971 (3.19%), 1972 (3.37%) and 1973 (3.80%). See P. 75 Ex. 11.

these figures are those representing the numbers of white unskilled laborers and service workers compared to all white Railroad employees: 9.92% (1966), 13.55% (1967), 13.47% (1968), 6.75% (1969), 6.58% (1970), 14.05% (1971), 14.89% (1972) and 13.87% (1973).

Judge Gagliardi's only statement on this issue is utterly ambiguous: "[P]roof of a statistical imbalance in the LIRR's management hiring is alone not enough to show such a pretext" (Op. at 13). Plaintiffs have never alleged that statistics alone establish pretext, but they do contend that such statistics are relevant as a factor, among all the others present herein, to establish that Harris' removal was motivated by racial discrimination and retaliation. Judge Gagliardi's conclusory statement -- which, if it qualifies as a finding at all, implies that an imbalance existed -- falls far short of the clear mandate of McDonnell Douglas Corp. v. Green, that is, to take into account (not to disregard) statistics as to the defendant's employment policy and practice in reaching a determination of whether Harris' case conformed to a general pattern of discrimination.

C. The Railroad's Subjective Criteria For Disciplinary Actions

In various contexts, from hiring to firing, the courts in Title VII cases have consistently recognized that subjective

standards used by employers frequently serve as a ready mechanism for discrimination. See, e.g., Culp v. General American Transportation Corp., 11 E.P.D. ¶10,688 (6th Cir. 1975); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Chambers v. Hendersonville City Board of Education, 364 F.2d 189 (4th Cir. 1966); Walton v. Xerox Corp., supra; Jackson v. City of Akron, Ohio, 411 F. Supp. 680 (N.D. Ohio 1976).

In Walton v. Xerox Corp., supra, plaintiff brought suit under Title VII alleging that he was wrongfully terminated from his job and seeking back pay and reinstatement. The court found that plaintiff had indeed been discharged from his employment as a result of racial discrimination and that the most significant factor therein was that the termination decision was the subjective evaluation of one man. See also EEOC v. Liberty Mutual Insurance Co., supra, 346 F. Supp. at 677.

The court in Jackson v. City of Akron, Ohio, supra, addressed the issue of whether plaintiff's discharge for insubordination and fighting on the job was motivated by considerations other than those expressed. In concluding that defendant's motivation was, in fact, racial discrimination, the court relied on the "practically unbridled nature of the various

departments' discretion to choose disciplinary measures" and the lack of uniform disciplinary policies.

> "The significance of this situation becomes apparent upon consideration of the opinions in Senter v. General Motors Corporation, supra, and Rowe v. General Motors Corpcration, 457 F.2d 348 (5th Cir. 1972). To paraphrase Rowe, the existence of discharge 'procedures which depend almost entirely upon the subjective evaluation and ... recommendation of [a supervisor] are a ready mechanism for discrimination against Blacks much of which can be covertly concealed and, for that matter, not really known to management. We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action.' 457 F.2d at 359. In the instant case, clearly the opportunity for covert discrimination existed." 411 F. Supp. at 689.

In Harris' case, the opportunity for covert discrimination patently existed and was exercised through the mechanism of Gaynor's and Dixon's unfettered discretion in meting out discipline in the absence of any guidelines or procedures. Despite this totally subjective system of discipline and the myriad cases in which such subjectivity is the touchstone for a finding of discrimination, the lower court made no finding and apparently failed to even consider this critical issue (i.e., how the Railroad's subjective disciplinary evaluations and procedures served as the vehicle -- the pretext -- for covert discrimination and retaliation against Edward Harris). In fact, the court alludes to this system of subjective evaluations ("in view of the LIRR's overall disciplinary policy") as justification for the Railroad's discharge of Mr. Harris (Op. at 14). Clearly, the

lower court's consideration of subjective standards as buttressing defendant's position rather than as a critical element of plaintiff's showing of pretext demonstrates an erroneous view of the law and is reversible error. See United States v. Hazelwood School District, 534 F.2d 805, 813 (8th Cir. 1976); Brown v. Gaston County Dyeing Machine Company, 457 F.2d 1377, 1383 (4th Cir. 1972) (lack of objective guidelines held to be badges of discrimination that serve to corroborate, not to rebut, racial bias).

D. The Railroad's Failure To Follow Normal Operating Procedures Vis-a-Vis Harris

In a plaintiff's demonstration of pretext, courts attribute great significance to a finding that the defendant failed to follow normal routine procedures in regard to the plaintiff. In fact, such a finding is generally a "red flag" to a court seriously examining the issue of pretext. See Village of Arlington Heights v. Metropolitan Housing Development Corporation, 45 U.S.L.W. 4073, 4077 (January 11, 1977) (departures from the normal procedural sequence may afford evidence that improper purposes are playing a role); Walton v. Xerox Corp., supra; Taylor v. Safeway Stores, Incorporated, 365 F. Supp. 468 (D. Colo. 1973), modified, 524 F.2d 263 (10th Cir. 1975); Lowry v. Whitaker Cable Corp., supra; Tidwell v. American Oil Company, 332 F. Supp. 424 (D. Utah 1971). See also Westinghouse Learning

Corp., supra, for a factual pattern similar to the present one (finding of discriminatory discharges under the N.L.R.A. based on (1) intensive and unusual investigation of plaintiff's shop area not extended to any other employee's area, no other employee ever discharged for first violation of defendant's safety rules and in extensive investigation no one ever spoke to plaintiff to secure his version of the events (employee Holmes); (2) written reprimand for failure to file timely inspection report never before received by any other employee, and supervisors, departing from customary practice, documented every rule infraction by plaintiff (employee Banks)).

Further, removal rather than transfer of black employees, when white employees were transferred, has been held to constitute discrimination. Walton v. Xerox Corp., supra; D. H. Baldwin Company, 207 N.L.R.B. 25 (1973), enforced, 90 L.R.R.M. 2891 (8th Cir. 1974). In fact, the Railroad has in the past transferred white employees who were encountering difficulties in the performance of their jobs at Penn Station to outlying stations such as Jamaica or Brooklyn, rather than discharging them (see pp. 31-32, Landsperg and Chauncey). Harris has a record of service with the Railroad spanning 23 years, double that of Landsperg's. Yet in Harris' case, the Railroad never made any effort to transfer him to another station but, instead, demoted him.

The Railroad also maintains a standard policy of presenting management employees with facts which are likely to lead to a demotion and affording them an opportunity to explain their version of events prior to demoting them (P. Ex. 15 -- Deposition testimony of Dixon 12/29/76). It is undisputed that in 1975 Harris was removed from service without being afforded this routine opportunity (see p. 18, supra, and 75 Tr. 409). In 1976, Gaynor's sudden appearance on November 11 at the beginning of Harris' work shift, without anyone previously notifying Harris, and his demand for the written report, failing which he removed Harris from service, falls far short of the standard practice and procedure routinely afforded white management employees. In Jackson v. City of Akron, Ohio, supra, the court noted that defendant's normal procedure in matters of discipline was to have the subject employee's foreman investigate the facts, including a discussion with the employee to hear his side of the story, and if the matter was not thereby resolved, an investigation would be conducted by the next higher level, and if discharge was ultimately decided upon, the effective date of termination would be made subsequent to the formal notice thereof to give the employee a further opportunity to explain. This procedure was not followed in Jackson and the court there held that the defendant's failure to follow its standard procedures prior to plaintiff's discharge supported its conclusion

that the dismissal was a pretext for unlawful discrimination. See Westinghouse Learning Corp., supra.*

Thus, although the case law makes it abundantly clear that a defendant's failure to follow its normal procedures vis-a-vis plaintiff is a significant factor to be considered when plaintiff attempts to demonstrate discriminatory or retaliatory discharge, the court below totally failed to consider plaintiffs' overwhelming evidence on this issue or to make any findings of fact or law on the matter. The failure to consider such highly relevant and probative material on the issue of pretext constitutes reversible error.

E. Shifting And Contradictory Reasons Given By Defendant For Harris' Discharge

In evaluating whether the Railroad's discharge of Harris was a pretext for discrimination, the district court was obligated to look at the totality of circumstances surrounding the discharge as well as all of the factors enumerated above. A

* The record abounds with further evidence of the Railroad's departure from its standard policies in dealing with Harris: for example, although Gaynor claimed it is routine procedure to require written reports when train delays occur due to human error, the yardmaster, ASM McKenna and A Tower testified that although each of them has previously been involved in or responsible for train delays, not one had ever before been requested to prepare a written report on the incidents Tr. 216-217; 267; P. Ex. 15); prior to Harris' experience in 1974, no management employee had been required to take a written Book of Rules exam; and, no applicant for the ASM position had ever taken any kind of qualifying examination, that is, until Harris first applied for the job in 1968.

glaring example of a factor totally ignored by Judge Gagliardi in his opinion was the constantly shifting and differing reasons for Harris' discharge given by the Railroad at different stages of both the 1975 and 1976 proceedings.

With respect to the 1976 proceeding, Gaynor stated in his pre-hearing deposition that one of the primary reasons for dismissing Harris was his alleged responsibility for the four train delays, the other two being "insubordination" and "poor performance". The initial four days out of a six day hearing were therefore devoted to the issue of the train delays, and substantial testimony was adduced from the Railroad's own witnesses that the yardmaster and C tower were largely responsible for the delays.* Having sat at counsel table the whole time, Gaynor then took the stand and testified that Harris was removed because of his "attitude" and "acts of insubordination", and never so much as mentioned the train delays. Gaynor was followed to the stand by Rizzacasa and Dixon, both of whom claimed Harris was fired for insubordination, not train delays. Indeed

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* The yardmaster specifically exonerated Harris for responsibility for three of the four delays, claiming responsibility in two instances. The yardmaster also testified that C Tower should have made sure the trains were in the proper position but that C Tower did not do so. See Statement of Facts, supra at 22-23.

Dixon said he had not even decided who was responsible for the delays when he approved the firing.*

The shifts in the Railroad's position as to why they discharged Mr. Harris, both in 1975 and 1976, were blatant attempts to rationalize baseless termination decisions motivated by discrimination and retaliation. Discriminatory discharge decisions emphasize that an employer's shifting and contradictory reasons for termination advanced subsequent to the employee's discharge is a significant factor in determining whether the discharge was based on cause or was a pretext to justify discrimination. D. H. Baldwin Co., supra; J. R. Townsend Lincoln Mercury, 202 N.L.R.B. 71 (1973); Goodyear Tire and Rubber Co., 197 N.L.R.B. 666 (1972); see Lowry v. Whitaker Cable Corp., supra.

II.

The Evidence Convincingly Establishes That Harris Was Subjected To Disparate Disciplinary Treatment. The Court's Conclusory Finding To The Contrary Is Without Basis In The Record And Misconstrues Applicable Title VII Legal Standards

The only issue relating to pretext which the court below considered at any length was the issue of disparate

* In 1975, as described above, Harris was first charged with failure to do his duties on a specified occasion, later, after the usher admitted that it was his mistake, the charge was changed to insubordination. And in a third shift, the Railroad claimed for the first time at trial that Harris was also demoted for past "poor performance". See discussion above at 15-16, 18.

disciplinary treatment, as to which it concluded that Harris had failed to meet his burden of proof. However, the court's conclusion was based on errors of law and was further defective for failure to make essential findings of fact. The opinion recites only the following facts:

> (1) ten LIRR white management employees were removed from service between 1971-75 for insubordination in refusing to cross a picket line;
>
> (2) ten other LIRR white management employees were removed from service "for a variety of reasons";
>
> (3) certain white management employees received lesser discipline than Harris for "different infractions". (Op. at 13-14)

From this -- which the court said indicated that Harris' punishment was not more severe than that of white management employees -- and "in view of the LIRR's [totally subjective] overall disciplinary policy" the court concluded that Harris had not met his burden of showing disparate treatment. But Harris was not required to show that every white employee received preferential treatment -- he was required to show that: (1) the Railroad had a subjective disciplinary policy; and (2) that the operation of this policy resulted in some whites receiving less onerous punishment than Harris for similar alleged infractions, or

alternatively, in some whites receiving the same punishment for more serious infractions. This the record fully supports.*

Although the trial court made no specific finding on the subjectivity issue, it is uncontested that the Railroad's disciplinary system is wholly subjective. As to the relative severity of the infractions for which the Railroad has demoted white employees, the refusal of ten management employees to cross a picket line and report to work is a direct act of insubordination far exceeding any conduct Harris is accused of; Harris never refused to come to work, nor did he refuse to write a report. On this point, then, the record is quite clear: (1) no management employee except Harris, has ever been removed by the Railroad on the grounds that such employee's delay in preparing a report (or failure to complete any other task within a certain time) constituted insubordination; (2) to the contrary,

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* The discipline imposed by the Railroad on other management employees is all contained in its written disciplinary records, so that no question of witness credibility requiring deference to the District Court's findings is raised. See Orvis v. Higgins, 180 F.2d 537, 539-40 (2d Cir. 1950). Moreover, the "clearly erroneous" rule does not apply to findings made under an erroneous view of controlling legal principles or to appellate review of findings of "ultimate" facts or mixed conclusions of law and fact. See Rowe v. General Motors Corp., 457 F.2d 348, n.15 (5th Cir. 1972); United States v. Jacksonville Terminal Co., 451 F.2d 418, 423-24 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972). Thus, this Court is free to correct the errors contained in the district court's opinion with respect to whether plaintiffs have met their burden of proving that the disparate discipline meted out by the Railroad to Harris in this instance corroborates his claim that he was fired as a pretext for discrimination.

only employees who have consciously refused to obey a direct order have been removed as insubordinate; and (3) in the one instance in the record of another employee delaying in the preparation of a report (4-5 days), the Railroad never claimed that this tardiness was insubordinate, nor was the employee in any way disciplined. Based on these undisputed facts, plaintiffs submit that the Railroad's dispensation of the identical discipline for far more egregious offenses (refusal to work) and no discipline for a virtually identical act (delay in preparing report), amply demonstrate disparate treatment regardless of the Railroad's claims with respect to its demotion of ten other employees for "a variety of reasons".*

* With respect to the group of ten employees removed for "a variety of reasons", the record below was extremely sketchy. The Railroad never explained, for example, whether the incidents falling within the broad catchall of "poor performance" were comparable to the reasons for which Harris was discharged or whether this amorphous appellation covered charges far more egregious than those alleged against Harris. In fact, Dixon admitted on cross-examination that he had no personal knowledge concerning the reason that five of these individuals had been fired, and that, indeed, the discipline files of such individuals did not necessarily reflect the reason for discharge (see p. 30, supra; Tr. 671-73). Whether this group of employees received better (or worse) treatment relative to Harris is a question compounded by the analytical problems inherent in subjective disciplinary standards utilized by the Railroad. As discussed, any doubts in this area should be resolved against the Railroad, as its lack of objective guidelines serves to corroborate, not rebut, racial bias. Brown v. Gaston County Dyeing Machine Company, 457 F.2d 1377, 1383 (4th Cir. 1972). In any event, whether or not this group of employees received preferential treatment is not a logical prerequisite to plaintiffs' case, inasmuch as it is not plaintiff's burden to demonstrate that each and every white employee has received more favorable treatment than Harris. See discussion, infra at 53 et seq.

Moreover, the court's analysis of disparate treatment was deficient for failing to come to grips with the evidence Harris introduced of other management employees who received more lenient treatment. The court referred to this as "lesser discipline for different infractions". We submit, however, that the "different" infractions were in fact more serious -- or at the very least comparable infractions -- and that the white employees' "lesser discipline" also demonstrates disparate treatment.

As set forth in detail above at pp. 30-32, the Railroad's discipline of Wership, Satter, Landsperg and Chauncey for far more serious infractions was nowhere near as severe as that imposed on Harris; and the discipline meted out to other employees found to be responsible for lengthy train delays is hardly comparable to the removal from service of a man with 23 years of service with the Railroad. It is clear from this evidence -- derived from the Railroad's own records -- that at least some white employees were treated more leniently than Harris for similar (or more serious) infractions.

The court's legal analysis on this point was also fatally flawed. As noted, the court seemed to believe that Harris had to show that all white management employees were treated more leniently than he; in fact, the law is that plaintiff sustains his burden if he shows that some such employees

were treated more leniently. Thus, in Kinsey v. First Regional Securities, Inc., No. 1338-71 (D.C. Cir. April 18, 1977), the Circuit Court held that a Title VII plaintiff, to satisfy his burden of proving pretext, need not show that every white employee has received preferential treatment. In Kinsey plaintiff argued that despite defendant's claim that it applied objective hiring criteria with respect to all applicants, and that such hiring criteria warranted defendant's refusal to hire plaintiff, he had been discriminated against because defendant had waived some of its hiring requirements as to several white applicants. The Court of Appeals agreed, holding that such non-uniform and unequal application of criteria by an employer constitutes an unfair employment practice. It was not necessary for the plaintiff to show that all white employees had received preferential treatment. See also EEOC Decision No. 75-035, CCH EEOC Dec. ¶6479 (October 2, 1974) (where, despite Respondent employer's showing that a white employee had been discharged for an equally serious offense, Charging Party was held to have made out a violation of Title VII on a record indicating that Respondent employer had treated more egregious conduct by other white employees far more leniently and that the Charging Party was the only employee ever discharged for that particular infraction).

In a similar setting, this Court has explicitly recognized that denying a black entry into an apprenticeship program where that black was at least as qualified as the least qualified white accepted into the program is an indicia of discrimination -- it was not necessary to show that the black applicant was as qualified as every white accepted. United States v. Bethlehem Steel Corporation, 446 F.2d 652, 665 (2d Cir. 1971). See also Bradshaw v. Associated Transport, Inc., 8 EPD ¶9,641 (M.D.N.C. 1974); United States v. Electrical Workers (IBEW), Local 357, 5 EPD ¶8,022 (1972).

Even assuming, for the sake of argument, that some white employees received discipline as harsh as Harris for similar alleged offenses, this fact is of little consequence. Many white employees have received far more lenient treatment for similar and for more serious offenses, while other white employees who have received punishment identical to Harris were guilty of far more egregious infractions. Such disparate treatment, effected through the "ready mechanism" of the Railroad's totally subjective system of discipline, is a per se violation of Title VII. McDonald v. Santa Fe Trail Transp. Co., 96 S. Ct. 2574 (1976); Rowe v. General Motors Corp., supra.

The lower court apparently considered the absence of two clear sets of standards for dispensing discipline -- one applied to black employees and one applied to whites -- as proof

that no disparate discipline existed. It assumed that a totally subjective disciplinary system is racially neutral because all management employees are subjected to the same type of system. What it totally ignored was that it is precisely the subjectivity and arbitrariness of the Railroad's system of discipline which served as the vehicle for discrimination and disparate dicipline in Harris' case. Rowe v. General Motors Corp., supra; Walton v. Xerox Corp., supra; EEOC v. Liberty Mutual Insurance Co., supra. See also, Jackson v. City of Akron, Ohio, supra, where the court, citing Rowe, supra, found that the existence of discharge procedures which depended almost entirely upon the subjective evaluation and recommendation of a supervisor, as in the instant case, had provided a mechanism for covertly concealing the defendant's discrimination against the plaintiff.

III.

The Railroad's Removal Of Harris In 1976 Was One More Step In The Railroad's Policy Of Retaliation Against Harris. The Court's Finding That The Railroad Removed Harris For Non-Discriminatory Reasons Is Based on Errors Of Law And Fact.

The trial court's inexplicable failure to even consider the substantive indices of discrimination and retaliation against Harris (and the black class members he represents) detailed in Section I above, necessarily distorted its view of the events leading to the Railroad's most recent reprisal against

Harris. Even if the events of 1976 are seen in vacuo, however, it is manifest that the court's ultimate findings that the Railroad articulated three non-discriminatory reasons for removing Harris are based on errors of law and are unsupported by the record.

A. Responsibility For Train Delays Cannot Be A Basis For Removing Harris

As one of three reasons supporting the Railroad's actions, the trial court, without concluding that Harris was "directly responsible" for the train delays, held that Harris had "final responsibility" and that this was a legitimate ground for his removal from service (Op. at 7, 12). The flaw in the Court's analysis is simply that the Railroad never claimed at trial that Harris' alleged responsibility for the delays was a reason for removing him from service.

Gaynor -- the Railroad's main witness and the individual who removed Harris in the first instance -- never even referred to the train delays in explaining his purported reasons for firing Harris:

> "Q. What were the fundamental considerations you had in mind when you told Mr. Harris to exercise his seniority?
>
> "A. His attitude, his acts of insubordination, no change in his attitude towards making write-ups, his lack of willingness to accept responsibility, and his attitude toward his fellow employees." (Tr. 492-93) (emphasis supplied).

Dixon, who in a midnight phone call approved the action, testified that he did so on the basis of alleged "insubordination" and that Gaynor told him in the same phone conversation that Harris was removed "for insubordination for not filing a report" (Tr. 494, 660)*. This is further supported by Dixon's own admission that at the time he approved Harris' removal he had not yet come to any conclusions as to who might have been responsible for the delays (Tr. 661).

In light of this clear and unambiguous testimony that responsibility for the train delays was not a justification offered by the Railroad for removing Harris, the trial court cannot simply create a justification -- not even articulated by the Railroad - and then conclude that this justification rebuts plaintiffs' prima facie case. McDonnell Douglas Corp. v. Green, supra, places the burden on the employer to articulate a legitimate, non-discriminatory reason for its action. 411 U.S. at 802. It is the intent with which an employer acts that is at issue, and to this end, it is the reasons proffered by the employer (not by the court) that must be scrutinized to determine whether its purported reasons are a pretext for

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* Rizzacasa also testified that Gaynor told him Harris was taken out of service for insubordination "for not having the report there that night" (Tr. 594).

discrimination. See, e.g., Lowry v. Whitaker Cable Corp., supra; Jackson v. City of Akron, Ohio, supra.*

B. Harris' Actions On November 11-12 Do Not, As A Matter of Law, Constitute Insubordination

The subsidiary facts underlying the trial court's ultimate conclusion that Harris was "insubordinate" for failure to prepare a second report are largely uncontested. See Statement of Facts, supra at 23 et seq. Plaintiffs contend that these undisputed facts cannot, as a matter of law, form the basis for a conclusion that Harris was insubordinate.

1. Insubordination requires an intentional, direct refusal to obey an order. Thus the trial court in deciding the issue of insubordination shall look to whether the employee has consciously refused a "direct instruction" from a superior. Martin

* In the present case, the trial court was perhaps confused as a result of the extensive testimony introduced by both parties as to who was responsible for the four train delays. This trial strategy was a result of the initial testimony of Gaynor at his deposition that Harris' alleged responsibility for the train delays was indeed one of the primary reasons for firing Harris. However, after extensive testimony tending to show that Harris was not responsible, Gaynor changed his tune and claimed that Harris was fired, because of his "attitude" and "acts of insubordination". The trial court's reliance on the train delay issue not only misinterprets the Green case by articulating a justification for removal never raised by the Railroad; the court has compounded that error by hinging its decision on a point consciously abandoned by the defendant. This drastic shift is in itself evidence of discriminatory intent (see Section I(E), supra at 47 et seq.), and can hardly support a finding that the Railroad has articulated a legitimate reason for its actions.

v. Sterling Drug Co., 8 EPD ¶9517 (S.D.N.Y. 1974); Jack v. American Linen Supply Co., 498 F.2d 122 (5th Cir. 1974). See also, Cunningham v. Civil Service Commission, 48 Haw. 278, 398 P.2d 155, 159 (1965); State v. Board of Regents of University of Nevada, 70 Nev. 347, 269 P.2d 265, 276 (1954); Porter v. Pepsi-Cola Bottling Co., 247 S.C. 370, 147 S.E. 2d 620, 622 (1966).

Significantly, the Railroad has taken a position consistent with the above cases as to the type of activity that constitutes insubordination (at least prior to its dismissal of Harris). Thus, of the 11 employees disciplined for insubordination, 10 of them intentionally refused a direct order to perform services during a strike and the remaining employee similarly refused an explicit order to move a train out of the station. Against this legal and factual backdrop, the Railroad cannot now claim that Harris' brief delay in submitting a supplemental report approaches insubordination. Neely v. California State Personnel Board, 237 C.A.2d 487, 47 Cal. Rptr. 64, 68 (D. Ct. App. 1965), cert. denied, 383 U.S. 960 (1966) (inefficiency and discourteouness does not amount to insubordination); Coomes v. State Personnel Board of California, 215 C.A.2d 770, 30 Cal. Rptr. 639, 642 (D.Ct. App. 1963) (insubordination excludes the notion of even negligent conduct).*

* While insubordination can, in some cases, be established by a general course of mutinous, disrespectful and contumacious

[footnote continued]

2. That Harris' actions did not constitute insubordination is confirmed by the testimony of Dixon. Dixon testified that if Harris had only delayed 24 hours in preparing a second report, this would have been "tolerable" and would not constitute insubordination (Tr. 663). It is uncontroverted, however, that when Harris was removed from service on November 12, it had been exactly 24 hours since he had first been asked to write a second report. Thus by the Railroad's own standards, Harris should not have been removed from service. To be sure, Dixon was contested on this point by Gaynor, who claimed the delay was "insubordinate", but the trial court cannot simply choose to rely on one Railroad witness and to ignore the admissions of his superior.*

3. Underlying the court's conclusion that Harris was insubordinate in not preparing a second report by November 12 are two findings that are unsupported by the weight of the credible evidence:

[continued footnote]

conduct (Neely v. California State Personnel Board, supra), that standard is hardly applicable to the present case, where it is not contested that Harris intended to write a second report and even offered to write it the night he was removed from service. If Harris intended to be mutinous or contumacious, he would certainly not have called Rizzacasa to advise him that he had been unable to write the report during the previous night.

* Indeed, Dixon's testimony is corroborated by the fact that the Railroad took no action whatsoever in the case of Landsperg, who delayed some four or five days to prepare a report for Gaynor in 1975.

(A) That Harris' first report was "too short" and not as complete as the ones prepared by the yardmaster or C Tower.*

A simple comparison of the reports actually written -- that is, documentary evidence to which the court made absolutely no reference -- rebuts this. C Tower never wrote a report as Dixon had claimed and the Harris report is on its face as long and as complete as the yardmaster's. (Indeed, Dixon unequivocally conceded this fact on cross-examination.)

(B) That the investigation was an urgent investigation and Gaynor needed Harris' second report to complete the investigation. (This last point is presumably the linch-pin to the argument that the Railroad was therefore justified in taking action against the alleged lone recalcitrant.)

The Gaynor and Dixon testimony on which the trial court relied, however, is again refuted by either documentary evidence or contradictory testimony from the same witnesses, all of which the court ignored. In the first place Gaynor's statement that Dixon was pressuring him to write a report was contradicted by Dixon himself who stated without qualification that he never even asked Gaynor to prepare a report on the delays. Moreover, while Dixon claimed that all the reports had been written at the time he fired Harris, the simple documented truth

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* As noted, Dixon claimed that Harris would never have been fired had he written a report as complete as the reports he received from the yardmaster or C Tower.

is that only one of the requested reports -- the yardmaster's -- had been completed. A Tower - certainly a central figure in this "urgent" investigation - was never requested to write a report and was not contacted about the delays until four days after Harris was fired. Likewise, C Tower did not prepare any report on the delays until after Harris was fired and then it was only at the request of the Railroad's counsel. (See p. 28, supra.)

Where the inferences of a trial court are based on oral testimony that is rebutted by undisputed written evidence as well as contradictory oral testimony elicited from the defendant's own witness, an appellate court is not bound by the trial judge's findings and may substitute its own. American Tobacco Co. v. The Katingo Hadjipatera, 194 F.2d 449 (2d Cir. 1951), cert. denied, 343 U.S. 978 (1952); Orvis v. Higgins, 180 F.2d 537, 539 (2d Cir. 1950).*

* In Orvis v. Higgins, supra, Judge Frank found that the trial judge's findings of fact were clearly erroneous. In discussing the standard to be applied under Rule 52(a), Judge Frank stated:

> "Where a trial judge sits without a jury, the rule varies with the character of the evidence: ... Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's findings and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance."

C. Harris' Alleged Poor Performance Is A Tag-Along Argument. The Trial Court, In Any Event, Failed To Make Specific Findings As Required By Rule 52(a).

The final point claimed by the district court to justify the Railroad's dismissal of Harris in 1976 was his alleged poor performance as an ASM. To support this claim the court below relied principally on testimony and memoranda offered at the 1975 hearing and also claimed that his "acceptance" of a suspension in 1975 was an admission of unsatisfactory performance. As noted, the trial court's only finding on these charges was its statement that an unidentified five instances were "not effectively rebutted" by Harris (Op. at 4). The court made no findings on the 1975 insubordination charge, although it noted obliquely that "evidence of insubordination surrounding his 60 day suspension in 1975 must be considered in upholding his present removal" (Op. at 12).

The court's vague reference that Harris' 60-day suspension was somehow evidence of guilt (coupled with its failure to make any findings as to Harris' claim of retaliatory firing in 1975) is grossly unfair. The 1975 compromise agreement was made on the Court's initiative and was without prejudice to the position of either party. Thus, it was no more an admission of guilt by Harris than the Railroad's reinstatement was an admission that it had improperly removed him. Moreover, the settlement had the very practical effect of putting Harris back on the job in under 40 days from the conclusion of the hearing --

certainly sooner than if Harris had waited for the court's decision and been granted complete relief on the merits.*

The court's general reference to five unspecified instances of poor performance is equally infirm, for it is impossible to determine to which instances, among the dozen or so claims of poor performance, the court is referring. It must first be considered that the reprimands and notices to which the court refers were never the subject of testimonial justification by the Railroad. Gaynor, the individual who signed the reprimands, was not asked to testify about the incidents by the Railroad, and on cross-examination, admitted he had almost no personal contact with Harris while he was on duty (75 Tr. 397).** Thus, the only testimony and the only first hand information with respect to the incidents relating to those events which the court had was the testimony of Harris, who the Court explicitly found to be an honest man (Op. at 21).

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* Nor was the timing consideration of minor importance. The court indicated in proposing the settlement that it would not likely file its decision for at least 30 additional days (75 Tr. 421-422). That meant that by accepting the 60 day suspension, which ran from the date Harris had been removed from service, September 12, 1975, Harris would be back on the job on November 11 -- about the earliest date that he could have expected to have returned had he turned down the settlement and awaited a favorable decision. Indeed, it took the Court approximately 60 days to reach its most recent decision in connection with Harris' dismissal in 1976. Manifestly, the 1975 60-day "compromise" was an offer that plaintiffs could not possibly refuse.

** It should be noted that these reprimands and notices began flowing from Gaynor's pen soon after the Railroad was forced to take Harris back in 1974 by virtue of his score on the court-ordered "Book of Rules" examination.

The fatal mischief in the court's failure to make specific findings in this respect can be illustrated in other ways as well: for example, when the Court refers to instances of Harris' "failure to make proper log entries", is it referring to Gaynor's memorandum to Harris, dated March 26, 1975 (D. 75 Ex. L), charging Harris with failure to record in the log book that an arrest had been made in the station during the night shift? Or, in light of the logbook's contents and Harris' unrebutted testimony that the arrest had in fact been recorded and that Gaynor in his haste had overlooked the entry (75 Tr. 200-202; P. 75 Ex. 16), is this one of the remaining instances that the court found was effectively rebutted?* The parties, and the appellate court, cannot be left to guess at the trial court's reasoning:

> "The degree of specificity and particularity with which the facts must be found may vary, depending upon the circumstances of each case, see Kelley v. Everglades Drainage District, 319 U.S. 415, 63 S. Ct. 1141, 87 L. Ed. 1485 (1943). But we must remember that an important function of the findings of fact is to aid an appellate court on review, see Advisory Committee Note to Rule 52(a) (1946); 5A Moore Federal Practice ¶52.0[1.5]. Findings that are nothing but cold rhetoric, couched in extraordinarily broad and general terms, and stripped of underlying analysis or justification or an accompanying memorandum or opinion shedding some light on the reasoning employed, invite closer scrutiny, especially when the case concerns fundamental constitutional freedoms. See Schneiderman

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* In either event, Gaynor, as usual, circulated this memorandum to the management hierarchy and made it a part of Harris' permanent record without even asking Harris for an explanation.

v. United States, 320 U.S. 118, 129-131, 63 S. Ct. 1333, 87 L. Ed. 1796 (1943)." Russo v. Central School District No. 1, 469 F.2d 623, 628 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973).

In light of the fundamental constitutional freedoms involved in the present case, the trial court's vagueness with respect to such unspecified instances is itself ground for reversal. Plaintiffs respectfully submit that the court's focusing (however inexactly) on such minor incidents, which -- even if true -- the Railroad admits occur every day, while ignoring the Railroad's past treatment of Harris is inexplicably myopic. On this point, it is informative to note that the court's inference that poor performance was a legitimate reason for removing Harris is based solely on a finding that five of the alleged instances were "not effectively rebutted". The logically necessary (though conspicuously unarticulated) correlative to this finding is that at least some of the dozen or so allegations of poor performance were effectively rebutted. This in itself raises a strong negative inference as to why Gaynor wrote the reports in the first place, and why Gaynor never spoke to Harris to get the facts before writing the reports and making them a permanent part of his record. Supporting this inference is the uncontested fact that other ASM's have supposedly failed to "make proper log entries" (Tr. 682, 717), yet Gaynor has has never made a written report on these incidents and inserted

them in the ASM's personnel file (P. 75 Ex. 19).* Thus, even if Harris did not make a complete logbook entry on some occasion (a point we strongly contest), this is hardly evidence of "poor performance" sufficient to justify his removal from service after 23 years on the Railroad. To the contrary, the very fact that he is the only ASM singled out by Gaynor on such matters is persuasive evidence -- ignored by the trial court -- that Gaynor's reports were no more than a transparent effort by the Railroad to mask its true motivations for removing Harris.

CONCLUSION

The order below should be reversed and a judgment for the plaintiff entered as a matter of law.

Dated: New York, New York
May 31, 1977

Respectfully submitted,

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* The single exception to this is a complaint written by one of Gaynor's predecessors (Stewart) in 1971 to W. C. Fuller, a black usher who worked as an extra ASM but was never promoted to a permanent position. Stewart claimed that there was a train misroute not reported in the log. Fuller thereafter advised Stewart that there had been a rescheduling and that the incident had been entered in the log (P. 75 Ex. 19).

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Index No.

FRANCES JOY CAPERS, et al., etc.,

Plaintiffs

against

LONG ISLAND RAILROAD, et al.,

Defendants

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 339 East Sixth St., New York, New York

That on May 31, *19*77 *deponent served the annexed* Appellant's Brief (2 copies)

on RICHARD H. STOKES, ESQ.
attorney(s) for Defendant Long Island Railroad
in this action at Long Island Railroad, Jamaica Station, Jamaica, New York 11435
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me May 31, 1977.

Robert A. Perkins

ROBERT A. PERKINS
Notary Public, State of New York
No. 41-8327500 - Queens County
Certificate filed in New York County
Commission Expires March 30, 1978

Charles M. Sporn

The name signed must be printed beneath
CHARLES M. SPORN

C 321 —Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

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Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF *ss.:*

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on *19* *deponent served the annexed*

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law